



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC 25 OF 2008

NORAH CHELAGAT.....PLAINTIFF

-VERSUS-

EDWARD NDIRANGU NJAKAI.....1ST DEFENDANT

AMOS K.C. KALE T/A

KALE MAINA & BUNDOTICH ADVOCATES.....2ND DEFENDANT

STEVE K. BUNDOTICH T/A

LAKE MAINA BUNDOTICH.....3RD DEFENDANT

BERNARD MAINA T/A

KALE MAINA BUNDOTICH ADVOCATES.....4TH DEFENDANT

RULING

The plaintiff herein sued the defendants in respect of ownership of property known as Nairobi/Block69/117 unit No.51, House 7 situate at South B, Kidong Road, Nairobi.

It is her case that she entered into an agreement with Teleposta Pension Scheme Registered Trustees to purchase the said property, but before the transaction was completed the property was sold to the 1st defendant, which sale was facilitated by the 2nd, 3rd and 4th defendants.

The 1st defendant filed a defence and counterclaim in which he set out the steps he took in purchasing the property from Teleposta Pension Scheme and which led to the registration of the property in his name. He pleaded that the property belongs to him and that the plaintiff's suit should be dismissed. He prayed for orders that he should be granted possession of the property and also orders of eviction to issue against the plaintiff to forthwith vacate the property aforesaid.

In the counterclaim, the 1st defendant repeated his entire defence and particularly paragraphs 3, 4, and 5 and counterclaimed against the plaintiff for orders for eviction and possession of the said property.

With particular reference to paragraphs 3,4,5 and his defence, the 1st defendant submitted that he entered into a Sale Agreement with Teleposta Pension Scheme on 27th September, 2007 for the purchase of the said property. It is his case that, he paid the full purchase price and the property was ultimately transferred to him by the Teleposta Pension Scheme Registered Trustees on 21st November, 2007. He was given a clear title dated 4th December, 2007. As a result, he states that he is the rightful owner and therefore entitled to the possession of the said property.

There is now an application before me by way of Notice of Motion under Order XXXV Rules 1 and 2 of the Civil Procedure Rules for orders that, judgment be entered for the 1st defendant against the plaintiff as prayed in the 1st defendant's counterclaim dated 23rd April, 2008. He also prays for costs of this application and the entire suit to be borne by the plaintiff.

Order XXXV of the Civil Procedure Rules provides for summary procedure. It is now trite law that for a party to be entitled to such orders, he or she must establish that there are no triable issues to justify the

waiting for a full trial. In the instant case and from the material presented, there are clearly triable issues. There are competing interest between the plaintiff and the 1st defendant who both claim to have entered into Sale Agreements with Teleposta Pension Scheme. The validity of the two agreements is an issue that cannot be determined by summary procedure. I have looked at both agreements and it is also a triable issue as to whether or not the 1st defendant acquired the property free from any encumbrances. I say so because, the plaintiff herein has deponed that she was a member of the Registered Trustees of the Teleposta Pension Scheme and that she has been residing in the said premises.

Another triable issue will be whether or not the plaintiff breached the terms of the agreement between her and the Teleposta Pension Scheme Trustees to warrant the engagement of the 1st defendant to purchase the said property. The role of the 2nd, 3rd and 4th defendants in this transaction is intertwined with the case of the 1st defendant *vis a vis* the plaintiff and their role is a triable issue in this suit.

With profound respect therefore, this is not a suitable case for summary procedure and the orders sought by the 1st defendant are premature. The application is therefore dismissed with costs to the plaintiff. Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE